Tee Siew Kai (as liquidator for Merger Acceptance Sdn Bhd) (in liquidation) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(IM)-843–04 OF 2017
HAMID SULTAN, ABANG ISKANDAR AND HASNAH HASHIM JJCA
12 NOVEMBER 2018

Companies and Corporations — Liquidators — Whether personally liable — Whether High Court rightly granted leave for liquidator to be sued personally for prima facie causing loss to interested party in the winding up process — Whether contentious issues raised in leave applicant's affidavit against the liquidator merited a trial

The respondent ('Machang') entered into a joint-venture agreement ('JVA') with Merger Acceptance Sdn Bhd ('Merger') to develop 17 pieces of land ('the lands') owned by the latter. By way of an irrevocable power of attorney ('the PA'), Merger appointed Machang as its attorney to deal with the lands. Whilst the development under the JVA was ongoing, Merger was wound up by order of court and the official receiver was appointed as its liquidator. Machang continued to carry out the development under the JVA but was itself wound up by a court order seven years after Merger's winding up. Wong Weng Foo ('Wong') was appointed as Machang's liquidator. Meanwhile, some years after Merger's winding up, the appellant ('Tee'), who was appointed as the company's liquidator in place of the official receiver, decided to sell several lands belonging to Merger for RM9m. Wong, as Machang's liquidator, applied to the High Court for leave to sue Tee in his personal capacity for causing Machang to suffer substantial loss and damage as a result of Tee's action in selling off Merger's lands without Machang's knowledge or consent. Wong contended that Tee had committed acts which were unlawful and in breach of both the JVA and the PA. Inter alia, Wong asserted that Merger could not unilaterally revoke the PA without Machang's concurrence and that Wong, as Machang's liquidator, retained the right and full authority to execute all documents on Merger's behalf in relation to the project under the JVA. The High Court granted the application for leave holding that the issues raised in the application merited a trial. The instant appeal was against that decision.

Held, dismissing the appeal:

(1) This was not a fit and proper case to intervene in the High Court's exercise of discretion to grant leave (see para 28).

(2) The court would be obliged to grant leave to sue the liquidator if on the face of the record there was sufficient material to show the liquidator had prima facie breached the concepts of accountability, transparency and good governance and that such breach had caused loss or was likely to have caused loss to the applicant. In the instant case, there were serious allegations as well as affidavit evidence that the liquidator had prima facie compromised with the jurisprudence relating to accountability, transparency and good governance. These were benchmarks which were now imposed by the international community on all transactions and professionals were expected to live up to the expectations of their calling. Liquidators, being professionals, could not shield themselves from being sued based on the old common law cases. The granting of leave per se did not materially prejudice any parties, save as to costs. It was also unlikely to substantially delay the winding up process (see paras 16(a), (c) & 17).

(3) The issue of not recognising an irrevocable power of attorney could lead to a sustainable cause of action. A registered irrevocable power of attorney could not be revoked unilaterally. A prudent liquidator would seek directions from the court to absolve himself from acting in breach of a rule of law and, in consequence, become personally liable for misconduct. Whether there was indeed a breach of a rule of law which resulted in loss and damage to Machang in the instant case was a matter which needed to be tried (see para 26).

[Bahasa Malaysia summary

Responden ('Machang') telah memasuki perjanjian usahasama ('PUS') bersama Merger Acceptance Sdn Bhd ('Merger') untuk membangunkan 17 bidang tanah ('tanah tersebut') yang dimiliki oleh Merger. Melalui surat wakil kuasa yang tidak boleh dibatalkan ('SK tersebut'), Merger telah melantik Machang sebagai wakilnya untuk menguruskan tanah tersebut. Sementara pembangunan di bawah PUS berjalan, Merger telah digulungkan oleh perintah mahkamah dan pegawai penerima rasmi telah dilantik sebagai penyelesainya. Machang terus menjalankan pembangunan tersebut di bawah PUS tetapi ia juga telah digulungkan oleh perintah mahkamah tujuh tahuan selepas penggulungan Merger. Wong Weng Foo ('Wong') telah dilantik sebagai penyelesai Machang. Sementara itu, beberapa tahun selepas penggulungan Merger, perayu ('Tee'), yang telah dilantik sebagai penyelesai syarikat menggantikan pegawai penerima rasmi, telah memutuskan untuk menjual beberapa tanah yang dimiliki Merger untuk RM9 juta. Wong, sebagai penyelesai Machang, telah memohon kepada Mahkamah Tinggi untuk kebenaran menyaman Tee dalam kapasiti peribadinya kerana menyebabkan Machang mengalami kehilangan dan kerugian yang substantial akibat tindakan Tee menjual tanah Merger tanpa pengetahuan atau persetujuan Machang. Wong menegaskan bahawa Tee telah melakukan tindakan yang menyalahi undang-undang dan melanggar kedua-dua PUS dan SK tersebut.

Antara lain, Wong menegaskan bahawa Merger tidak boleh di satu pihak membatalkan SK tersebut tanpa persetujuan Machang dan bahawa Wong, sebagai penyelesai Machang, mempunyai hak dan kuasa penuh untuk menyempurnakan semua dokumen bagi pihak Merger yang berkaitan dengan projek di bawah PUS itu. Mahkamah Tinggi memberikan permohonan untuk kebenaran dengan memutuskan bahawa isu-isu yang ditimbulkan dalam permohonan mewajarkan suatu perbicaraan. Rayuan ini adalah terhadap keputusan tersebut.

Diputuskan, menolak rayuan:

(1) Ini bukan kes yang sesuai dan wajar untuk campur tangan dalam pelaksanaan budi bicara Mahkamah Tinggi bagi memberikan kebenaran (lihat perenggan 28).

(2) Mahkamah akan cenderung untuk memberikan kebenaran menyaman penyelesai jika atas rekod terdapat material yang mencukupi untuk menunjukkan penyelesai secara prima facie telah melanggar konsep akauntabiliti, ketelusan dan tadbir urus yang baik dan bahawa pelanggaran sedemikian telah menyebabkan kerugian atau kebarangkalian menyebabkan kerugian kepada pemohon. Dalam kes ini, terdapat dakwaan serius dan juga keterangan afidavit bahawa penyelesai secara prima facie telah berkompromi dengan jurisprudens berkaitan akauntabiliti, ketelusan dan tadbir urus yang baik. Tanda aras tersebut yang kini digunapakai oleh komuniti antarabangsa berhubung semua transaksi dan para profesional diharapkan dapat memenuhi jangkaan pekerjaan mereka. Penyelesai, sebagai professional, tidak dapat melindungi diri mereka daripada disaman berdasarkan kes-kes undang-undang am lama. Pemberian kebenaran per se tidak secara material memprejudiskan mana-mana pihak, kecuali kos. Ia juga tidak mungkin menyebabkan kelewatan substantial proses penggulungan (lihat perenggan 16(a), (c) & 17).

(3) Isu tidak mengiktiraf surat kuasa wakil yang tidak boleh dibatalkan itu boleh membawa kepada kausa tindakan yang boleh dikekalkan. Surat kuasa wakil yang tidak boleh dibatalkan tidak boleh dibatalkan di satu pihak sahaja. Penyelesai yang berhemah akan memohon arahan dari mahkamah untuk membebaskan dirinya daripada bertindak melanggar rukun undang-undang dan, akibatnya, menjadi bertanggungjawab secara peribadi kerana salah laku. Sama ada sememangnya terdapat pelanggaran rukun undang-undang yang mengakibatkan kehilangan dan kerugian kepada Machang dalam kes ini adalah suatu perkara yang perlu dibicarakan (lihat perenggan 26).]

Notes

For cases on liquidators in general, see 3(1) *Mallal's Digets* (5th Ed, 2018 Reissue) paras 598–611.

Cases referred to

Ahmad Zubir bin Zahid (suing by himself and as the administrator of the estate of Fatimah binti Samat, deceased) v Datuk Dr Zainal Abidin Abdul Hamid & Ors [2018] MLJU 1534, CA (refd)

Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal [2018] 4 MLJ 799; [2018] 2 CLJ 257, CA (refd)

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582, QBD (refd)

Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority [1998] AC 232; [1997] 3 WLR 1151, HL (refd)

Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204; [1995] 4 CLJ 11, CA (refd)

Davy v Garrett (1878) 7 Ch D 473, CA (refd)

ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors [2013] 3 MLJ 35, CA (refd)

Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (refd)

Marine Mansions Co, Re (1867) LR 4 Eq 601 (refd)

MBF Finance Bhd v Sri-Hartamas Dvpt Sdn Bhd [1992] 3 CLJ Rep 55, HC (refd)

Montgomery v Lanarkshire Health Board [2015] UKSC 11, SC (refd)

Naxakis v Western General Hospital [1999] 197 CLR 269, HC (refd)

Pakata Sdn Bhd v Chean Seong Fatt & Ors [2001] MLJU 190; [2001] 6 CLJ 318, HC (refd)

Rogers v Whitaker [1992] 175 CLR 479, HC (refd)

Sidambaram a/l Torosamy v Lok Bee Yeong (representative to the estate of Soma Sundram a/l Doraiswamy) [2017] 4 MLJ 570, CA (refd)

Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors [1995] 1 MLJ 1, SC (refd)

William H Parsons And Others v The Sovereign Bank of Canada [1913] AC 160, PC (refd)

Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors [2009] 3 MLJ 191; [2010] 2 CLJ 858, CA (refd)

Legislation referred to

Companies Act 1956 [IND] s 543
Companies Act 1965 s 305
Companies (Winding-Up) Rules 1972 r 63
Courts of Judicature 1964 s 69
Powers of Attorney Act 1949

Rules of Court 2012 O 30

Appeal from: Company Winding-Up No 28–99 of 2001 (High Court, Pulau Pinang)

K Kirubakaran (Lim Yap Thong with him) (Shui-Tai) for the appellant.
Bastian Pius Vendargon (S Raven and Siti Nur Amirah Aqilah Adzman with him) (S Ravenesan) for the respondent's liquidator.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/liquidator of Merger Acceptance Sdn Bhd appeals against the decision of the High Court which exercised its discretion and granted leave to commence proceedings against the liquidator personally. The notice of motion for leave in the High Court, inter alia, read as follows:

> *TAKE NOTICE* that the Court shall be moved on *20 AUG 2016*, 2016 at 9 a.m./~~p.m.~~ or soon thereafter as Counsel can be heard, by Counsel for Wong Weng Foo, the Liquidator of the above named Applicant being Machang Indah Development Sdn Bhd (In Liquidation) (Company No 0144891-M) (formerly known as Rakyat Corporation Sdn Bhd), under the inherent powers of this Court, for an Order which states as follows:
>
> > (1) That the Applicant be given leave to commence legal proceedings against Tee Siew Kai (NRIC No 500325-01-5579), the Liquidator of the above named Respondent, in his personal capacity per the Proposed Writ and Proposed Statement of Claim annexed herewith as *ANNEXURE [1]*.

[2] We heard the appeal on 17 January 2018 and took the view that the appeal has no merit as the appellant was not able to convince us, inter alia, on the law to intervene on matters relating to the discretionary exercise of the High Court. In consequence, the appeal was dismissed in limine. We now give our grounds.

[3] The supplemental memorandum of appeal read as follows:

> 3. The Learned High Court Judicial Commissioner ('the learned JC') erred in law and in fact when he entertained and allowed the Respondent's application vide Notice of Motion dated 22-7-2016 in Enclosure G ('the Motion') to seek leave of the High Court to commence legal proceedings against Tee Siew Kai ('Tee') personally whilst acting as the liquidator for Merger Acceptance Sdn Bhd ('Merger') by invoking the inherent jurisdiction of the High Court of Malaya instead of the readily available relevant statutory provisions in the Companies Act 1965.
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> 4. The Learned JC erred in law and in fact when he found that the Respondent had the necessary locus standi to commence in the High Court a legal suit against Tee in his personal capacity for his conduct of liquidating the assets of Merger although the Respondent was neither a shareholder nor a contributory of Merger at the time

when the Respondent filed and moved the Motion.

5. The learned JC erred in law and in fact when he proceeded to consider and evaluate the proposed Statement of Claim (annexed to the Motion) and reproduced merely as an 'Exhibit 2' to the Respondent's 1st Affidavit) and concluded that *'there is a necessity for the contentious issues and disputes to be ventilated and litigated between the Appellant and the Liquidator in the proper forum of the proposed action in a civil Court.*

6. The learned JC erred in law and in fact when he held that the Respondent had to demonstrate *'that it had suffered loss as a result of the breach of duty by the Liquidator'* and then proceed to find as follows:

> *I agree with the contention advanced by the counsel for the Applicant that the Liquidator's failure to give satisfactory rebuttal to the Petitioner's averment, an irresistible conclusion can be made that the unsold and unbuilt lots to Kelana Estate and Oasis Highland Sdn Bhd at the selling price of RM9,000,000.00 (Nine Million) has impacted the creditors and contributors of the Respondent.*

6.1 In arriving at this conclusion, the learned JC failed to take in consideration that the Respondent in this Appeal (the Applicant in the High Court in the Motion) was neither a creditor nor a contributory of Merger.

7. In allowing the Motion, the learned JC failed to take into consideration the following further facts:

(i) Merger was, on 19-11-2009, ordered to be wound-up by an order of the High Court in Kuala Lumpur in Companies Winding-Up Petition No: D28NCC-44-2009 and in these circumstance was incapacitated and unable in law and in fact to perform its part on the obligations under the Joint Venture Agreement dated 29-9-1995 ('JVA') and project management agreement ('PMA') also dated 29-9-1995;

(ii) That the JVA and PMA were effectively terminated and/or frustrated with the winding-up of Merger as the Respondent could not and did not expend any monies to continue to develop the remaining unsold 124 vacant lots by virtue of the application of the undue preference principle since the Respondent itself was ordered to be wound-up on 17-06-2002;

(iii) That the JVA and PMA were contemporaneously executed documents evidencing on transaction for the development of the project involving the unsold 124 lots and as such both the JVA and PMA stood terminated by the Order of winding-up;

(iv) There was no clear rebuttal evidence from the Respondent in respect of the following facts:

a. The project was halted and abandoned since Merger was ordered to be wound up and also the fact the Respondent was itself ordered to be wound-up on 17-06-2002 by the Penang High Court vide Companies (Winding-Up) Petition No: 28-09-2001);

b. Pursuant to and order of the Court below, the Appellant was appointed as the liquidator of Merger on 28-8-2013 to replace the

Ketua Pengarah Insolvensi ('KPI') and empowered to take into possession of the 124 un-developed units which were unsold and to redeem them from Bank Kerjasama Rakyat Malaysia Berhad ('Bank Rakyat');

c. The consideration for the sale of the unsold and unbuilt 124 units at RM9,000,000.00 had correspondent to the value opined by the Appellant's valuer and the Appellant's chargee's valuer.

d. The Appellant as the liquidator of Merger had since its appointment acted in the best interest of the liquidation process of Merger.

(v) That the Appellant had a duty as an officer of the Court to Liquidate Merger expeditiously and in the process, sell the unsold assets of Merger subject to the payment of the redemption sum to Merger's secured creditor; and

(vi) That the Respondent's primary complaint was that the alleged unlawful act of the Appellant had caused the Respondent to:

a. Suffer loss and damage in the sum of RM300.801.58 being the Respondent's entitlement under the JVA based on the alleged market value of RM16.5million less the redemption sum; and

b. The Appellant's refusal to acknowledge the subsistence of the JVA.

8. The learned JC ought not to have summarily granted the leave sought by the Respondent to commerce a civil suit personally against the Appellant for the alleged breaches of the JVA and PMA between the Respondent and Merger despite there being credible denial of the factual averments between the Appellant and the Respondent in the exchange of affidavits between them and ought to have in the circumstances of the entire case dismissed the Motion.

BRIEF FACTS AND FINDINGS OF THE HIGH COURT

[4] The facts of the case has been well articulated by the learned judicial commissioner in His Lordship's comprehensive judgment. To appreciate our judgment, the judgment of the learned judicial commissioner must be read together. To save judicial time, we will repeat the facts and findings as placed in a rudimentary manner before us which read as follows:

BRIEF FACTS OF THE CASE:

1. The applicant and the respondent in High Court are parties to joint venture agreement dated 29 September 1995 ('the JV'). The purpose of the JV is to develop and complete a light industrial estate project ('the project') on the respondent's 17 pieces of land in Penang. The JV provides the parties for the sharing profit and loss.

2. The respondent appointed the applicant as its attorney in relation to the merger lands by an irrevocable power of attorney dated 29 September 1995. The respondent also appointed the applicant as project manager of

A the project by a project management agreement dated 29 September 1995 ('the PMA'). Clause 11 of the PMA states among others that the agreement shall be terminated forthwith in the event that either party shall be wound up voluntarily or compulsory. There is no similar clause in either the JVA or the irrevocable PA.

B 3. On 17 June 2002 whilst the project was ongoing, the respondent was wound up. Despite that, the applicant still carried on the project since it viewed that it is still valid under both the JVA and the irrevocable PA. The applicant claimed that the PA survived the winding up of the respondent and remain valid and subsisting thereafter. The official receiver of the C respondent had no issue with the applicant carrying on the project.

4. The applicant also has been wound up on 19 November 2009. One Wong Weng Foo was appointed as the applicant's liquidator.

5. Yet, the applicant still carried on the JVA on the same view that the irrevocable PA survived.
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6. Only after four years the appellant has been wound up, the liquidator of the respondent was appointed to replace the official receiver.

7. At the time of the appointment of the respondent's liquidator, there were 124 subdivided unbuilt individual parcels from the merger land which E had yet to be sold and redeemed from the Bank Kerjasama Rakyat Malaysia ('Bank Rakyat'), of the charge of the merger lands ('unsold and unbuilt lots').

8. About a year after his appointment, the liquidator caused the respondent to sell the unsold and unbuilt lots purportedly to one Kelana Estate Sdn F Bhd ('Kelana Estate') for RM9m.

9. The applicant contended that the sale of the properties to Kelana Estate was purported one because the liquidator had caused the respondent to sell seven lots out of 124 unsold and unbuilt lots to Kelana Estate for a total consideration sum of RM500,000. While the remaining 117 lots G were sold to Oasis Highlight for a total sum of RM8,500,000. It caused the applicant to suffer loss and damage in the sum of RM3,300,801.58 ie equal to the amount of the applicant's 40% share in the net proceeds of the sale of the unsold and unbuilt lots based on a selling price of RM16,500,000 and a redemption sum of RM8,247,996.05 ('redemption H sum').

10. The applicant then filed an application to commence legal proceedings against the liquidator of the respondent personally as per the proposed writ and statement of claim (encl G).

I 11. The application was granted by the High Court thus this appeal to the Court of Appeal.

FINDING OF LEARNED HIGH COURT JUDGE

1. The applicant has locus standi to file this application based on the inherent power of the court. Since the liquidator is appointed by the court,

thus as an officer of the court, a leave is required before an action is commenced against him. The court will protect its officer from spurious or vexatious litigation and the court will protect its integrity of the winding up process to ensure no wrongful interference with the process.

2. In the case of *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors and Other Appeals* [2012] 2 CLJ 501, the court applied the test of a prima facie case in determining whether leave ought to be granted to sue a liquidator. The court held that the court is compelled to evaluate the evidence led to determine whether the test is met.

3. Based on the affidavit by the liquidator on the issue of the JVA and the irrevocable PA, the court held that there is necessity for the contentious issues and disputes to be ventilated and litigated between the applicant and the liquidator in the proper forum of the proposed action in a civil court.

4. In an application for leave to commence proceeding, inter alia, breach of duty against a liquidator, it is necessary to prove pecuniary loss to the company. From the petitioner's affidavit, the court opined that the petitioner's averment in it are relevant to be considered in deliberating on the issue of the pecuniary loss to the respondent. The liquidator on the other hand offered no response to the issues raised by the petitioners. It is an irresistible conclusion that the unsold lots to Kelana Estate and Oasis Highland Sdn Bhd at the selling price of RM9m has impacted the creditors and contributors of the respondent.

5. Thus, the applicant's application is allowed with costs of RM4,000 be paid by the liquidator to the respondent.

JURISPRUDENCE RELATING TO 'RECEIVER AND MANAGER', LIQIDATOR, APPOINTMENT, ACTION AGAINST LIQUIDATOR, REMOVAL, ETC

[5] To appreciate the role, appointment, action against liquidator and removal of liquidator, one need to appreciate the jurisprudence related to the role of 'Receiver and Manager' ('R&M'), at common law (see *Janab's Key To Law, Practice and Legal Remedies* (2nd Ed, 2019) pp 423–428; O 30 of the Rules of Court 2012). The liquidator mentioned in the Companies Act 1965 ('the CA 1965') has its reminiscent relating to 'R&M' at common law. A liquidator is appointed once the company is wound up as opposed to 'R&M' (see *Re Marine Mansions Co* (1867) LR 4 Eq 601).

[6] The Companies Act also recognises the appointment of 'R&M'. Some of the sections for understanding the role, obligation and liability of the 'R&M' is summarised as follows:

(i) Section 182 of the Companies Act 1965 specifically sets out the persons who are not qualified to be appointed as receiver and manager and

includes:

(a) a corporation; (b) an undischarged bankrupt; (c) a mortgage of any property of the company, an auditor of the company or an officer of the company or of any corporation which is a mortgage of the property of the company; and (d) any person who is not an approved liquidator or the Official Receiver.

(ii) Section 183 of the Companies Act sets out the liability of the receiver, and says that notwithstanding any agreement to the contrary, but without prejudice to his rights against the company or any other person, be liable for debts incurred by him in the course of the receivership or possession for services rendered goods purchased or property hired leased used or occupied. This section also permits the receiver to seek directions from the court. Debenture holder can also seek directions from the court in relation to any matter arising in connection with the performance of the functions of the receiver and manager.

(iii) Section 184 of the Companies Act 1965 gives power to the court to fix remuneration of receivers and managers.

(iv) Section 185 of the Companies Act 1965 makes provision for a liquidator to be appointed as a receiver upon the application of debenture holders or creditors of a company which is being wound up by court.

(v) Section 186 of the Companies Act 1965 makes it mandatory for the person who obtains an order for appointment of receiver and manager to lodge a notice with the Registrar. If the receiver and manager appointed subsequently ceases to be the receiver and manager, he must lodge a notice with the Registrar to that effect. Failure to comply attracts penal consequences.

(vi) Section 187 of the Companies Act 1965 makes it mandatory for all letter heads and documents of the company where receiver and manager or liquidator has been appointed to state that receiver and manager as the case may be has been appointed.

(vii) Section 188 requires the receiver and manager to send notice to the company of his appointment, prepare statement of officers of the company etc. Failure to comply attracts penal consequences.

(viii) Section 189 of the Companies Act 1965 sets out the manner the statement of affairs must be prepared. Failure to comply attracts penal consequences.

(ix) Section 190 of the Companies Act 1965 sets out the manner in which the accounts of receiver and manager need to be lodged. Failure to do so attracts Penal consequences.

(x) Section 191 of the Companies Act 1965 deals with the manner of payment of company debts, subject to floating charge in priority to claims under the charge.

(xi) *Section 192 of the Companies Act 1965 makes provision to enforce the duty of the receiver and manager and make him liable for misconduct in applying the funds of the company.* (Emphasis added.)

[7] In essence, the common law obligation of 'R&M' and the obligation of liquidator in a compulsory winding is inextricably interwoven. There may be slight difference in the removal of liquidator in a voluntary winding up as the liquidator is appointed by agreement of parties and not through the courts; and the process of removal need not be through a court procedure though any misconduct of a liquidator in a voluntary winding up may be subject to the same jurisprudence as advocated by courts in a compulsory winding up.

[8] It must also be noted that at the time the 'R&M' jurisprudence originated at common law, that too a few centuries back the appointments were related to lay persons probably with no remuneration and the court appointed them to assist the court to resolve issues. To encourage the acceptance of such appointment, the court gave them some protection by developing the concept as what we now call as 'officers of court'. Such protection was necessary to protect the lay persons or its like who are qualified in the view of the court (as opposed to tertiary qualification) appointed by the court to be sued without obtaining the leave of the court. The learned authors of *Halsbury Laws of England* (4th Ed) at p 430 observes:

> In the ordinary case of a receivership of the rents and profits of land, it is not a fatal objection that the person nominated has no experience of estate management, or even that he is illiterate, provided that he is in other respects well qualified.

[9] Over the years, the 'R&M' and including liquidator are now appointed based on people who have suitable qualifications and that too for remuneration. Thus, the obligation of 'R&M' inclusive of liquidators are professional in nature and they are obliged to adhere to principles of accountability, transparency and good governance, as set out in case laws, which is seen as one related to evolutionary jurisprudence (see *Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal* [2018] 4 MLJ 799; [2018] 2 CLJ 257). When a complainant can demonstrate to the court, these categories of people have breached their professional obligations and there are sufficient prima facie material before the court to take cognisance of the breach and there is an element of loss and/or damage, the court ought to grant leave to commence proceedings against the 'R&M' or liquidator personally, unless there are other specific sections in the statute to deal with the complaint justly as well as expeditiously.

[10] The significance of 'R&M' at common law is also reflected in the CA 1965. For example, the CA 1965 defines 'liquidator' by stating that it includes the official receiver when acting as liquidator of the corporation. Thus, the official assignee plays the role of official receiver and liquidator where applicable under the Companies Act. The jurisprudence relating to 'R&M' at law is significant in appreciating the process of appointment, court action, role as well as removal of the liquidator:

(a) learned authors of *Kerr on Receivers and Administrator* define court appointed 'R&M' as follows:

> A receiver in an action is an impartial person appointed by the court to collect and receive, pending the proceedings, the rents, issues and profits of land, or personal estate, which it does not seem reasonable to the court that either party should collect or receive, or for enabling the same to be distributed among the persons entitled.

(b) the learned authors of *Halsbury Laws of England* (4th Ed), p 406, on the issue of liability of 'R&M' makes the following observations:

> Prima facie a receiver appointed out of court, being an agent only, is not personally liable in respect of transactions properly entered into by him as receiver. However, if a receiver gives his personal promise to pay a debt for which his principals may become liable, he is bound by the promise, but the question whether the promise is the personal promise of the agent or the promise only of his principals depends in each case upon the intention of the parties, to be gathered from the terms of the document, if any, containing the promise. A receiver of the property of a company appointed under the power contained in any instrument is, except so far as the contract otherwise provides, personally liable to the same extent as if he had been appointed by an order of the court. He is entitled, as receiver, to ratify contracts made by others ostensibly as agents for the company. Where under the express terms of a debenture the receiver is agent for the company, his authority as agent is determined by the commencement of liquidation, whether voluntary or compulsory, and he is personally liable under contracts made after that date. As an agent, a receiver may always render himself personally liable in damages for breach of warranty of authority. A receiver may be liable in tort as a trespasser where the appointment is defective or where the title of a third person such as a trustee in bankruptcy prevails over that of the debenture holders and the company. A receiver who is sued with the company, fraudulent conspiracy between the Defendant being alleged, may not refuse to produce material company documents on the ground that he holds them as agent for the debenture holders.

[11] It is now well settled that any action against a court appointed 'R&M' or liquidator, need the leave of court (see *William H Parsons And Others v The Sovereign Bank of Canada* [1913] AC 160; *Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors* [1995] 1 MLJ 1). In considering leave to sue the company or liquidator, the courts generally consider the following:

(a) whether granting of leave will lead to unnecessary litigation and costs related to the winding up proceedings;

(b) if the dispute can be settled in the winding up proceedings itself, the court may refuse to grant leave for the institution of a separate suit or proceeding which may add to costs and delay in the winding-up proceedings; and

(c) leave is usually granted when third parties are involved with dispute related to the company which has nexus to liquidation.

[12] A liquidator is now specifically recognised as an officer of court by virtue of r 63 of the Companies (Winding-Up) Rules 1972 which read as follows:

> 63 Officers of Court
>
> All liquidators appointed by the Court shall be officers of the Court.

[13] Section 305 of the CA 1965, to some extent makes provisions to deal with the misconduct of liquidator, etc but the complainant must be the liquidator, creditor or contributory and the loss or damage must be directly to the company. If the misconduct of the liquidator is of benefit to the company, s 305 may not apply and the common law jurisprudence to leave procedure to sue the liquidator may apply.

[14] The Court of Appeal in *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204; [1995] 4 CLJ 11, had relied on the jurisprudence related to 'R&M' under the common law to anchor the argument that the liquidators are officers of the court and in consequence leave is necessary. In saying so, the criteria for granting leave to sue 'R&M' had also been adopted for that purpose (see *Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors* [2009] 3 MLJ 191; [2010] 2 CLJ 858).

[15] The learned judicial commissioner in the instant case, had meticulously summarised the threshold criteria to grant leave and that part of the judgment reads as follows:

> [26] On the issue of the threshold and the standards of proof to be met before leave to sue a liquidator is granted, I agree with submission advanced by the counsel for the applicant that had made reference to the principle of the law laid down by the Singapore High Court in the case of *Excalibur Group Pte Ltd v Goh Boon Kok* [2012] 2 SLR 999 (at pp 1010–1011) set out the various approaches taken by courts in different jurisdictions on the matter:
>
> (1) There is no specific threshold for the grant of leave to sue a liquidator according to the Australian case of *Sydlow Pty Ltd (in liquidation) v TG Kotselas Pty Ltd* [1996] 144 159.
>
> (2) *Sydlow Pty Ltd (in liquidation) v TG Kotselas Ptv Ltd* also held that a prima facie case need not necessarily be shown; all the circumstances have to be taken into account in determining whether leave should be granted.

(3) The Supreme Court of New South Wales in the case of *Re Biposo Pty Ltd; Condon v Rodgers (2 August 1995)* held that the standard was simply one of whether there is a prima facie case.

(4) The Victorian Supreme Court in the case of *Armitage v Gainsborough Properties Pty Ltd* [2011] VSC 419 applied a combined test of whether there was a prima facie case and whether there was sufficient evidence to show that the proposed claims had a prospect of success.

(5) The Malaysian case of *Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd* [2007] 3 MLJ 571 applied the test of whether there was sufficient prima facie evidence to support the allegations against the liquidator.

(6) In *See Teow Guan v Kian Joo Holdings Sdn Bhd* [2010] 1 MLJ 547, the Court took the view that the threshold for leave would depend on the circumstances and that a variety of factors such as the sufficiency of the evidence adduced and the likelihood of success of the proposed action should be considered.

(7) In *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* the court considered that the court hearing the application for leave will act liberally; however the applicant is required to satisfy the court of the probable success of the action and that the action is not vexatious or merely oppressive.

[27] In *Excalibur Group Pte Ltd*'s case (at p 1011), the Singapore High Court took the views inter alia that (a) all facts and circumstances of the case have to be taken into consideration when deciding whether to grant leave, (b) hard and fast rules should not be laid down, (c) the applicant must at least be able to show a prima facie arguable case, (d) the Applicant need not go so far as to snow he will or is likely to succeed, (e) applications without any foundation or that are frivolous or vexatious or calculated to delay proceedings or with an ulterior motive will not be allowed, and (f) the stage at which the proceedings are when such applications are made will also be a very relevant consideration.

[28] The Federal Court in the case of *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors and Other Appeals* [2012] 2 CLJ 501 (at p 520) applied the test of a prima facie case in determining whether leave ought to be granted to sue a liquidator. In applying the test, the Federal Court held that the court is compelled to evaluate the evidence led to determine whether the test is met.

[16] We have read the appeal records and the able submissions of the parties. After giving much consideration to the submissions of the learned counsel for the appellant, we took the view that the appeal has no merit. Our reasons, inter alia, are as follows:

(a) an appointment of liquidator in the present era is one related to a professional. Any professional appointed for a remuneration has an obligation to meet with the required professionalism not only to the relevant parties to the winding up but also to third parties who have nexus to the winding up or is an aggrieved person in consequence of

misconduct or its like of the liquidator. The court will be obliged to grant leave to sue the liquidator if on the face of record there are sufficient material to demonstrate that the liquidator has prima facie breached the concept relating to accountability, transparency and good governance and that breach has caused loss or likely to have caused loss to the applicant. Such an approach will be consistent with the Malaysian and Singapore cases inclusive of cases from England, Australia, India, etc;

(b) granting of leave is related to the discretionary power and/or jurisdiction of the High Court. The appellate court will be slow to interfere with the discretionary jurisdiction of the High Court (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; *ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors* [2013] 3 MLJ 35; *Davy v Garrett* (1878) 7 Ch D 473 (CA));

(c) at this time and era, granting of leave per se does not cause material prejudice to any parties, save as to costs. It is also unlikely to substantially delay the winding up process in Malaysia as a whole, in contrast to say ten years ago. Currently, a civil or commercial suit is required to be disposed of within nine months in the High Court and an appeal process will take less than six months only if the papers are in order;

(d) if leave is not granted by the High Court, the Court of Appeal by virtue of s 69 of the Courts of Judicature 1964 ('the CJA 1964'), is obliged to revisit the decision and the evidence or affidavits to see whether the applicant has met the threshold to grant leave; and

(e) as mentioned earlier, the courts when dealing with 'R&M' a few centuries ago, were over protective of 'R&M' as even lay persons were appointed to assist the court in settling disputes in a civilised manner. To encourage potential 'R&M' to be appointed, the courts protection was needed. Such stringent protection is no more necessary as demonstrated by a number of cases, even in jurisdiction outside Malaysia. Thus, the threshold to obtain leave is not high when the application is not frivolous, vexatious or abuse of process of court. The court in granting leave, can settle the order with suitable terms inclusive of making provisions for security for costs, etc.

[17] In the instant case, there are serious allegations as well as affidavit evidence to demonstrate the liquidator has prima facie and/or on the face of record had compromised with the jurisprudence relating to accountability, transparency and good governance. These are benchmarks which is now imposed by the international community on all transactions and professionals are expected to live to the expectation of their calling. Liquidators being professionals cannot shield themselves from being sued based on old common law cases. For example, what was seen in medical negligence cases which more

or less gave wide protection to doctors under the *Bolam* principle has been slowly whittled down to near zero by development of case laws (see *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; *Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority* [1998] AC 232; [1997] 3 WLR 1151 (HL); *Rogers v Whitaker* [1992] 175 CLR 479; *Naxakis v Western General Hospital* [1999] 197 CLR 269; *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; *Ahmad Zubir bin Zahid (suing by himself and as the administrator of the estate of Fatimah binti Samat, deceased) v Datuk Dr Zainal Abidin Abdul Hamid & Ors* [2018] MLJU 1534).

[18] A liquidator who has conflicting views on any issues relating to interested parties, is given the privilege of seeking direction of the court to resolve the issue by bringing all necessary and interested parties before the court.

[19] It was the contention of the appellant that there was a specific section in the Companies Act to sue the liquidator and the respondent's application seeking leave pursuant to inherent jurisdiction of the court was not proper. Section 305 of the CA 1965 reads as follows:

> 305 Power of Court to assess damages against delinquent officers, etc
>
> (1) If in the course of winding up it appears that any person who has taken part in the formation or promotion of the company or any past or present liquidator or officer has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, the Court may on the application of the liquidator or of any creditor or contributory examine into the conduct of that person, liquidator or officer and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just.
>
> (2) This section shall extend and apply to and in respect of the receipt of any money or property by any officer of the company during the two years preceding the commencement of the winding up whether by way of salary or otherwise appearing to the Court to be unfair or unjust to other members of the company.
>
> (3) This section shall have effect notwithstanding that the offence is one for which the offender is criminally liable.

[20] As we have said earlier, s 305 of the CA 1965 is limited to certain parameters. The annexure related to proposed writ is much wider. Section 305 does not displace the common law cases to sue the liquidator for misconduct

per se. The authorities which the appellant relied on at this point namely: (i) *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204; [1995] 4 CLJ 11; (ii) *MBF Finance Bhd v Sri-Hartamas Dvpt Sdn Bhd* [1992] 3 CLJ Rep 55; (iii) *Pakata Sdn Bhd v Chean Seong Fatt & Ors* [2001] MLJU 190; [2001] 6 CLJ 318, does not say so in relation to leave.

[21] Section 305 is related to loss or damage to the company and is not related to loss to the interested parties who have nexus to the liquidation process. The Indian Companies Act 1956 ('the ICA 1956') has a similar provision. Their s 543 also deals with 'Power of Court to assess damages against delinquent directors', etc. Learned authors of A Ramaiya (11th Ed) on the scope of the section at p 1355, observes:

> The proceeding under this section does not extend to any and every kind of claim which a company may have against delinquent directors or officers. It is limited to claims relating to misfeasance or breach of trust in respect of their duties in relation to the company.

[22] Section 305 of the CA 1965 is not meant to cover all types of cause of action as well as parties. Causing loss to the company and causing loss to interested parties to the winding up process by liquidators are separate issues. For example, a liquidator can be made liable for professional negligence to interested parties to the winding up process. Section 305 may not cover professional negligence, though common law cases require leave to sue the liquidator and such leave is ordinarily given under the inherent jurisdiction as was developed through the jurisprudence related to 'R&M' which we had mentioned earlier. Learned authors of *Datta on Company Law* (5th Ed) on s 543 of the ICA 1956 observes:

> The object of this section is to enable the Court to enquire into the allegations made against the persons in management, to determine their liability and compel them to discharge such liabilities towards the company.

[23] The appellant relies on s 305 which specifically relates to an application by liquidator or of any creditor or contributory. Thus, admitting that the application can only be made by three persons. However, a perusal of the supplementary memorandum of appeal itself will show that the appellant contradicts by saying the applicant has no locus standi. Further, in arguing that leave should not be granted, the appellant places a misconceived argument stating, inter alia, that:

> 8.3 The primary issue between the Respondent and the Appellant were on the issue of the JVA and the irrevocable PA. These issues were credible contested in the exchanges of affidavits between the parties to this appeal.
>
> 8.4 The effect of the Merger's winding-up on 17/6/2002 had caused Merger to be incapacitated and unable in law and in fact to continue performing its part under

A the JVA. The Appellant's contention is that the JVA and PMA was terminated forthwith by the fact that of the winding-up of the Respondent on 17/6/2002.

8.5 Since the winding-up of the Merger, the Respondent did not file any proof of debt with the Appellant as required under the law for any claims against Merger. In other words, the Respondent can only be classified as a creditor if it had proved its
B debt before the liquidator of Merger or had obtained judgment against Merger in a civil suit. Otherwise, it would remain a person claiming to be a creditor and a third party outside the winding up proceedings. As such, he is a stranger in the winding-up proceedings.

8.6 Further, to put the Respondent's case at its highest, as the Respondent is not a
C secured creditor but claiming to be a contractual party who had yet to obtain a judgment against Merger in a civil suit, Merger could no longer in law have any further sharing of profit with the Respondent under the JVA after the winding-up of Merger as it would amount to undue preference to the Respondent against the general body of creditors of Merger.

D

[24] Thus, para 8.6 of the appellant's submission contradicts the arguments related to s 305 of the CA 1965.

E **[25]** In the instant case, the liquidator of the respondent Wong Weng Foo had specifically asserted in the affidavit, inter alia, as follows:

7.9 Subsequent to his appointment as the Liquidator of the Respondent, the said Tee Siew Kai had committed unlawful acts in relation to the Merger Lands, the Project and the Unsold & Unbuilt Lots by causing Merger to disregard and breach
F both the JVA and the Irrevocable PA by inter alia, causing Merger to sell the Unsold & Unbuilt Lots to one Kelana Estet Sdn Bhd at a selling price of RM9,000,000-00 without the knowledge and or consent of the Applicant as the lawfully appointed Attorney of Merger.

Annexed herewith and marked collectively as *Exhibit '6'* are copies of exchange of
G correspondences between the said Tee Siew Kai and the liquidator of the Applicant in support of the above stated.

[26] We have perused the exchange of correspondent in exh '6'. The issue of not recognising irrevocable power of attorney may lead to sustainable cause of
H action. In addition, the registered power of attorney or irrevocable power of attorney cannot be revoked unilaterally (see *Sidambaram a/l Torosamy v Lok Bee Yeong (representative to the estate of Soma Sundram a/l Doraiswamy)* [2017] 4 MLJ 570; Powers of Attorney Act 1949). At least, a prudent liquidator will seek the direction of the court to absolve himself from acting in breach of rule of law
I and in consequence be made personally liable for misconduct. Whether there was indeed a breach of rule of law which resulted in loss and damage to applicant for leave is a matter which need to be tried. In our view, inter alia, three letters which were exchanged will demonstrate the bona fide of the complaint and the nature of purported unlawful act. They are as follows:

(a) letter by Wong Weng Foo dated 16 December 2013 to the appellant which read as follows:

Your Ref:

Our Ref : MACH/CT/011/0822/WWF

Date:16*th* December 2013

Merger Acceptance Sdn Bhd (In Liquidation) c/o Messrs. S.K. Tee & Co

8, Jalan Nyonya, Pudu

55100 Kuala Lumpur.

BY POST/FAX (03-21431301)

Dear Sirs,

RE: MERGER ACCEPTANCE SDN BHD (IN LIQUIDATION) NOTICE OF APPOINTMENT OF LIQUIDATOR

The above matter and your letter dated 21*st* November 2013 refers.

I enclose herein a copy of the Power of Attorney dated 29 September 1995 given to Rakyat Corporation Sdn Bhd by Merger Acceptance Sdn Bhd for your reference.

Please be informed that there are several purchasers of lots located at Taman Perindustrian Machang Indah who are in the process of disposing their individual lots. The sub-sale transactions of these purchasers would be severely hampered in the event that I cease to execute the relevant land transfer documents.

Further be informed that as the aforementioned Power of Attorney is *irrevocable* I state that as the Liquidator of Machang Indah Sdn Bhd (In Liquidation) I have the full authority to execute any document on behalf of Merger Acceptance Sdn Bhd (In Liquidation): see *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor* [2013] 3 MLJ 161 (Federal Court).

Thank you.

Yours faithfully,

(t/t)

Wong Weng Foo

Liquidator

Machang Indah Development Sdn Bhd

(in Liquidation)

(b) the response by the appellant by letter dated 27 December 2013 which read as follows:

Merger Acceptance Sdn Bhd

(Company No. 250318-H)

(in Liquidation)

December 2013

Mr. Wong Weng Foo

The Liquidator

Machang Indah Development Sdn Bhd (in Liquidation)

41 Damai Complex

Jalan Dato' Haji Eusoff

50400 Kuala Lumpur.

Dear Sirs,

MERGER ACCEPTANCE SDN BHD (In Liquidation) ('the Company')

POWER OF ATTORNEY IN RELATION TO THE JOINT VENTURE AGREEMENT DATED 29 SEPTEMBER 1995 BETWEEN MERGER ACCEPTANCE SDN BHD AND RAKYAT CORPORATION SDN BHD ('the PA') FOR THE DEVELOPMENT OF THE LIGHT INDUSTRIAL ESTATE LOCATED ON SEVENTEEN PIECES OF LAND HELD UNDER LOT NOS. 444, 447, 1614, 1615, 1616, 1617, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1913, 1914, 1915 & 1916 IN MUKIM 17, DISTRICT OF SEBERANG PERAI TENGAH, STATE OF PULAU PINANG ('the Project')

We refer to your letter dated 15 December 2013 on the above matter.

We hereby put you on notice that you shall cease executing any documents in relation to the Project as well as any documents on behalf of the Company without our specific instructions.

Should you require any further information or clarification, please do not hesitate to contact the undersigned.

Yours faithfully,

For and on behalf of

the liquidator of

MERGER ACCEPTANCE SDN BHD

(in Liquidation)

(t/t)

DAWN CHU

c.c. Jabatan Insolvensi Malaysia

Cawangan Pulau Pinang

Aras 9, Bangunan Persekutuan Pulau Pirang

Jalan Anson

10400 Pulau Pinang.

U/P: Puan Rohaifiza binti Md Rodzi

(c) the response letter dated 28 January 2014 by Wong Weng Foo which read as follows:

Your Ref:

Our Ref : MACH/CT/011/0822/WWF

Date: 28th January 2014

Merger Acceptance Sdn Bhd (In Liquidation)

c/o Messrs. S.K. Tee & Co

8, Jalan Nyonya, Pudu

55100 Kuala Lumpur.

BY POST/FAX (03-21431301)

Dear Sirs,

MERGER ACCEPTANCE SDN BHD (IN LIQUIDATION) ('THE COMPANY') POWER OF ATTORNEY IN RELATION TO THE JOINT VENTURE AGREEMENT DATED 29 SEPTEMBER 1995 BETWEEN MERGER ACCEPTANCE SDN BHD AND RAKYAT CORPORATION SDN BHD ('the PA') FOR THE DEVELOPMENT OF THE LIGHT INDUSTRIAL ESTATE LOCATED ON SEVENTEEN PIECES OF LAND HELD UNDER LOT NOS. 444, 447, 1614, 1615, 1616, 1617, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1913, 1914, 1915 & 1916 IN MUKIM 17, DISTRICT OF SEBERANG PERAI TENGAH, STATE OF PULAU PINANG

The above matter and your letter dated 27th December 2013 refers.

Please be informed that the donor cannot unilaterally revoke an irrevocable power of attorney without the concurrence of the donee. Accordingly, Merger Acceptance Sdn Shd (In Liquidation) as the donor must obtain my consent as the Liquidator of Machang lndah Development Sdn Bhd, as the donee in order for the former to revoke the aforementioned power of attorney; see *Cergas Tegas Sdn Bhd (In Liquidation) v Sap Holdings Bhd & Anor* [2013] 8 CLJ 745 (Court of Appeal).

Further be informed that a power of attorney granted by a company is not revoked upon the winding up of the company; see *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (In Liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201 (Federal Court) and *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor* [2013] 3 MLJ 181 (Federal Court).

I therefore maintain my position that as the Liquidator of the Company, I have full authority to execute any document on behalf of Merger Acceptance Sdn Bhd (In Liquidation).

Thank you.

Yours faithfully,

(t/t)

Wong Weng Foo

Liquidator

Machang Indah Development Sdn Bhd

(In Liquidation)

[27] We are mindful that the appeal is related to leave to sue only and in consequence we do not wish to deal with the appellant's submission as well as supplementary memorandum of appeal venturing into the merit of the dispute itself.

[28] We do not think that it is a fit and proper case to intervene in an exercise of the High Court's discretion by the learned judicial commissioner and in consequence, the appeal was dismissed with costs of RM10,000 subject to allocator. The deposit was ordered to be refunded.

We hereby ordered so.

Appeal dismissed.

Reported by Ashok Kumar